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BACKSIGHTS & FORESIGHTS

Volume #24 Number 1

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IN THIS ISSUE:

2014 Scholarship Recipients

(Top to Bottom) Jenifer Brooks - STI, Travis Jordan - SDSU, Jason Schutz - STI, James Cohoon - STI, Cole Van Liere - STI, Derek Sachtjen - STI, (not pictured: Philip Kafka - LATI)

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PUBLICATION DEADLINES

Material Cutoff	*Publication*
January 15	February 1
April 15	May 1
July 15	August 1
October 15	November 1

Backsights and Foresights
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FROM THE PRESIDENT:

As I write this, it is another below zero day with a fresh coating of snow on the ground and it seems that spring is as far off as it was in December! I hope everyone has fared well through this winter that never seems to end.

In preparing for the busy seasons ahead, keep in mind the safety needs of your crews. With the changing seasons, I always think of spring as snake and tick season, and hate them both equally. For the snakes I try to avoid areas that they are prone to be although it does not always work, but with the ticks a lot of repellent is necessary. And since I never think of it in winter but sun block is a must with the changing seasons.

I was very fortunate to attend the Minnesota convention. It is a worthwhile event to attend and their guests are very well treated. If I could I would attend again. Unfortunately I was not able to attend the other state conventions due to scheduling issues.

The legislative session has been a quiet one for us this year to date. We are very fortunate to have a lot of members who keep a close eye on the bills as they are introduced and we are grateful to them for all the work that they do.

We are still working on the updates for the Recommended Guidelines and hope to get together as a committee to work on the changes with an eye toward bettering the profession. It seems the biggest issues are surveyors not filing corner records or filing some sort of map of survey to show the work they have performed, and an issue of importance to me, the setting of double (or more) corners. To the public it really looks like we don't know what we are doing, and it seems like a show of arrogance at times (I can measure/survey better than you). I agree that sometimes the original may be so far off that it does need to be changed but I also believe that we should have a process to deal with that issue. At times, the issue may be that the incorrect corner has been relied on by the property owners and any change to the location would cause many problems legal and otherwise.

Another issue of importance is participation in our professional society. I, as well as many others, have been involved as committee members, board members, and chapter members. It seems like the same people have rotated through a number of offices and served in many different capacities. I would like to encourage everyone to be willing to serve on committees or in other capacities during your professional career. Please don't wait to be asked if you have an interest in a certain area, feel free to contact the Chairperson of the committee as they are always looking for people to fill these positions and fresh new ideas are always welcome.

As with a lot of other professional groups, SDSPLS is looking at going to an online version of the Backsights and Foresights. I know many of our members would prefer to continue with the printed version, but the costs of printing and mailing are getting higher every year. Just one look at our budget shows that this is one of the most expensive items in the budget. This is an item that will be on the next meeting agenda and any comments you may have can be directed to me and will be shared at that meeting.

In closing, I hope everyone has a safe and profitable year and I look forward to serving you this year.

Diane Aas
2014 SDSPLS President

The following information is taken from
the meeting minutes of the
South Dakota Board of Technical Professions

complete meeting minutes can be found at:
www.state.sd.us/dol/boards/engineer

May 31, 2013

Approved the following LS Comity Applications:

Daniel Kools – LS #11711 – WI
Eric Roeser – LS #11712 - MN

July 26, 2013

Approved the following FLS examinees
who passed the FS exam on April 13, 2013:

David Fielmeier – S-11377
Marcus Nelson – S-11378
Tyler Smith – S-11379
Andy Wildberger – S-11380

Approved the following PS examinees
who passed the PS exam on April 12, 2013:

Jeffrey Janis – LS #11700
Steven Peik – LS #9405
Zacary Remily – LS #11699

Approved the following FLS examinees
to take the FS exam on October 26, 2013:

Mark Gustad
Daniel Johnson
Stephen Kilber
Leif Redinger

Approved the following LS Comity Applications:

Edward Brisendine – LS #11780 – CA
Jason Harrell – LS #11781 – OK
Nicholas Phipps – LS #11782 – TN
Harry Sinco – LS #11783 – CO
Matthew Stern – LS #11784 – ND

Surveyors & Title

By Knud E. Hermansen † P.L.S., P.E., Ph.D., Esq

Surveyors, as a general rule, stay clear of providing title opinions — rightfully so. Nevertheless, reasonably competent surveying services must rely on some fundamental knowledge of title opinions. A surveyor that is ignorant about the basis for a title opinion could fail to provide relevant information necessary for an attorney to provide a competent title opinion.

A deed is merely evidence of title – not proof of title

One of the fundamental concepts forming the need for an informed title opinion from a competent source is the fact that **the deed is merely evidence of title, not proof of title**. Every surveyor has heard a client or neighbor claiming: "I've got title to that property" or "I own that property." The statement is usually made as they waive their deed about in a manner meant to forestall any further questioning of their right to claim to some boundary. However, unless the surveyor is in one of the few states permitting registered title and the surveyor is actually dealing with a registered title in that state, a deed is merely evidence of title – NOT proof of title. This is true despite the fact the deed is a warranty deed. If a deed were proof of ownership there would be no need for a title search or title insurance.

Since the deed is only evidence of title and not proof, the prudent buyer will obtain a title opinion. A title opinion is founded on two parts: 1) facts and information about the title and 2) an analysis of the facts and information culminating in an informed opinion. The facts are usually portrayed in the form of an abstract of prior records. The abstract is a compilation of information found in deeds, mortgages, releases, and other recorded documents. In the past, an abstract of title was prepared (or an existing abstract added to) for almost every property conveyed. The completed abstract was examined by a knowledgeable attorney who provided an opinion on the title.

A title opinion will opine that the title is one of the following (not always succinctly): clear, marketable, defensible, clouded (unmarketable), or there is merely color of title.

Clear title is title that has no defects. It is title unencumbered by liens, encroachments, or other impediments that would cut short or curtail the complete and reasonable enjoyment of the entire property. In modern practice, title that is encumbered by zoning restrictions is still considered clear unless the current use of the property is in violation of the zoning.

Marketable title is title that a reasonably prudent and intelligent person, informed of the facts and their legal ramifications, would be willing to accept in the ordinary course of business. Marketable title is generally free from serious encumbrances, material defects, reasonable doubts, and well-founded concerns about its validity. It is title that can be sold or used as security at fair market value and allows the owner quiet and peaceful enjoyment of the property. It is title that does not expose an owner to probable litigation (regardless of the probability that the litigation outcome will be in the owner's favor). Circumstances that have been found to make title unmarketable include breaks or gaps in the chain of title, encroachments that violate zoning, title founded on adverse possession (but not litigated to quiet title), less than a complete property interest, impairment of legal access, and boundary disputes or potential boundary problems.

Defensible title is title that has potential problems that will not likely cause the loss of title but would cause the prudent buyer to pay less than the market value. Defensible title looks to the probability of the outcome of litigation involving a title defect. Marketable title looks to the probable and reasonable likelihood of litigation exposure.

Clouded or unmarketable title is title that is defective in some aspect sufficient to cause reasonable concern that the buyer will not receive all the benefits they have bargained for. While the buyer may be willing to purchase the property, the price will be less than the fair market value of the property had the title to the property existed without the deficiency.

Color of title is the appearance of title. It is title that is all form without substance. The person has a deed but the deed conveyed no title.

Interjected into the title determination and acceptability of the title opinion is title insurance. Title can be insured against loss, damage, etc., from a multitude of sources, based on the standards of the insurer and the risk of loss. From a practical viewpoint, all title is insurable if the premiums are made large enough or the list of exceptions extensive enough. Consequently, the term "insurable title" has some wide possibilities.

Title insurance can, in some cases, insure the marketability of the title. This has given some people room to argue that title insurance should be able to substitute for marketable title when the title insurance company is ready and willing to provide insurance that will affirmatively cover one or more conditions that may affect the marketability. However, marketable title and insurable title are not the same as they differ by discrimination criterion. Marketable title uses a reasonably intelligent or prudent person criterion based on future prospects for the property. Furthermore, marketable title requires a person accept or reject the title as it stands at the time of conveyance. The buyer or lender cannot qualify or condition their acceptance of the title.

On the other hand, insurable title uses a reasonably prudent investor or insurer criterion. The investor or insurer analyzes the risks, costs, profit margins, and the likelihood of successfully defending the title. The insurer can change the risk and amount of their indemnity by

adding exceptions to the policy or using affirmative insurance. Consequently, they have the power to set conditions or stipulations for insuring the title that the buyer or lender does not have when determining if the title is marketable.

Consider the buyer who intends to build a house and a large garage where that person can indulge in his hobby of working on old cars. The buyer chooses a lot that is just sufficient in size to build the house and large garage. The seller is an elderly widow who is motivated to sell and plans to move in with her daughter. As a result, the buyer gets a great deal, purchasing the lot and residence for $120,000. In the purchase and sales agreement, the buyer agreed to accept insurable title rather than marketable title. As a consequence an abbreviated title examination occurs and an owner's title policy is issued. After purchasing the lot, the buyer discovers the width of the lot is five feet less than described in the deed. As a result of the deficiency in the width, the large garage cannot be built. The buyer files a claim with the title insurer. The title insurer contacts the neighbor to determine the cost and availability of purchasing a five-foot strip. The neighbor demands $3,000. Next the title insurer obtains an appraisal on the lot with five feet less in width. The appraisal values the lot at $119,000. The title insurer sends the buyer a check for $1,000. The buyer has been financially compensated for the loss sustained by the reduced width. The title insurer is obligated to financially compensate for the loss sustained, not satisfy the needs or aspirations of the buyer.

Title opinions have deficiencies. Both the abstract and opinion are only as good as the knowledge, training, and experience of the person preparing the abstract and tendering the opinion. Even a quality title opinion has dozens of caveats (usually unstated). Matters outside the record, defects arising from government regulations (e.g., zoning), encumbrances appearing in the record beyond the period encompassed in the title search, or conditions at the site, to name a few, are often not factored into a title opinion.

Without words to the contrary in a purchase and sales agreement for property, the buyer or lender has the right to expect marketable title from the seller or borrower where a warranty deed is sought and promised.

> Every purchaser of land has a right to demand a title which shall put him in all reasonable security and which shall protect him from anxiety, lest annoying, if not successful suits be brought against him, and probably take from him or his representatives, land upon which money was invested. He should have a title which shall enable him not only to hold his land, but to hold it in peace; and if he wishes to sell it, to be reasonably sure that no flaw or doubt will come up to disturb its marketable value. *Hebb v. Severson*, 32 Wash.2d 159, 167-168, 201 P.2d 156, 159 (1948) quoting *Dobbs v. Norcross*, 24 N.J.Eq. 327

Consequently, surveying services involved in the conveyance of property should focus on those aspects of surveying services that could affect the marketability of the title. Discovery of disputed boundaries and encroachments are important. Even remote chances of boundary litigation will make the title unmarketable. All problems that have a potential detraction on the marketability of the property should be reported. Here is where a surveyor who presumes adverse possession or prescription has occurred and fails to report this deficiency in title does the client a disservice. Without a judgment supporting title gained by adverse possession or prescription, the title is not marketable.[1]

Sometimes when a surveyor has discovered a problem and reported the problem, the surveyor has been pressured by a closing agent to obscure or remove the written disclosure from the survey work products in order that the buyer may be led to believe the buyer will be receiving marketable title.

The surveyor should make every effort to provide complete and accurate information for persons to arrive at a competent decision on the status of the title to be conveyed. This caution does always require every problem that exists be discovered or emphasized in a report.

Consider a 500-acre farm that has a one-foot strip of encroachment along an 80-foot section of the farm's boundary. This title is not a "clear title" because of the possibility of adverse possession of the one-foot strip. Nevertheless, the relatively small encroachment along such a small portion of the boundary to a large property will have no effect on the marketability of the title. A reasonable buyer, informed of the encroachment would still be willing to pay the fair market value for the 500-acre farm with or without the one-foot encroachment. Yet, the same one-foot encroachment on a one-quarter acre urban lot would make the title unmarketable. The reasonable buyer would either refuse to purchase the lot or demand a reduction in the purchase price upon discovery of the one-foot encroachment along a boundary of the one-quarter acre lot.

The concepts that have been outlined in this article point to the basis for many of the requirements set forth in the ALTA/ACSM Land Title Survey. As petty as many of the ALTA/ACSM Land Title requirements may appear to the surveyor, an insurer has judged the presence or, in some cases, the absence of certain features or conditions to have an affect on the marketability of the title or pose an unacceptable risk for the title insurer.

In the day-to-day practice of the surveyor, knowledge of the concepts presented in this article can help the

(Continued on Page 7)

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[1] See *Ivalis v. Harding*, 496 N.W.2d 690, 173 Wis.2d 751 (1993) where the court ultimately determined the boundaries located by the surveyor were in fact the actual boundaries of the property based on adverse possession but nevertheless held the surveyor liable for the cost of the litigation in order to perfect the title to the property by adverse possession.

SDSPLS – Board of Directors Meeting
Thursday, January 9, 2014
Missouri Winds – Cedar Shores Resort – Chamberlain, SD

(This report subject to BOD approval)

Participants: President Eric Meyer, Past-President Mark Lippincott, President-Elect & Missouri River Chapter President Diane Aas, Secretary Eric Howard, NSPS Governor Tom Berkland, Big Sioux Chapter President Wade Lunders, West River Chapter President Ben Lamke, Legislative Committee Chair Gary Andersh, DPC Representative Don Jacobson, Membership Committee Chair Ron Fisk, Randy Bacon South Dakota Board of Technical Professions, Executive Director Janelle Finck, Harold Peterson, President - Minnesota Society of Professional Surveyors, Steve Peters, and Chad Dodds,

1. Call to order at 8:04 (central) by President Meyer.
2. Acceptance of Agenda: Addition of SDSM&T grant application under New Business item d). Change the last letter in Old Business to d). Add SDBOTP vacancy to Committee Reports item i). ++Motion by Berkland to approve Agenda as amended, 2nd by Lippincott. Motion approved.
3. Secretary's Report – Eric Howard. Approval of minutes for the Friday, October 25, 2013 BOD Conference Call. ++Motion by Aas to approve minutes, 2nd by Berkland. Motion approved.
4. Treasurer's Report – Steve Thinglestad: Written report submitted for review. ++Motion by Lippincott to approve the report, 2nd by Berkland. Motion approved.
5. President's Report – Eric Meyer: No Report.
6. Committee Reports:
   a) Education Committee – Kristi Goehring: No Report.
   b) Legislative Committee – Gary Andersh: Nothing new that impacts at this time. Meyer states there may be issues with restricting access to flooded land and to keep the meandering waters issue on the watch. Discussion followed.
   c) DPC Report – Don Jacobson: No report.
   d) Standards Committee – Dean Scott: No report.
   e) Public Information Committee – Mark Lippincott: No report.
   f) Membership Committee –Ron Fisk: Written report of membership summary. We lost Furgo Horizons Inc. as a sustaining member. Trimble will remain but will no longer advertise in the newsletter. The results are unsure about the fall out of adding NSPS to the membership. We lost a few but gained a few at convention time. There was discussion about Life membership qualification. Consensus was that if the member is still deriving income from the profession, you should be considered active.
   g) NSPS - Tom Berkland: Tom reports there are currently 41 signed MOU's and with more signing this month. Discussion follows. Tom also reports the goal of the NSPS is the promotion of surveyor's skills, and they are possibly going to add an ALTA/ACSM certification. This program will not be required but will be placed in a data base for people searching for this type of survey. Discussion was also had on the possibility of NGS requiring certification for Geodetic Surveys.
   h) Trig Star –Dan Britton: No Report.
   i) SDBOTP –Randy Bacon: Discussion of upcoming vacancy of Randy's seat on the SDBOTP. Randy would like to see an LS take his spot on the board due to their experience and perspective. There are 374 LS and 83 PE/LS. Randy also states it is nice to have different parts of the state represented on the board. Len Neugebauer will be termed out next year as well. Each term is 3 years and is limited to 3 terms. Steve Peters is present and expresses his interest. Individuals are encouraged to send letters of recommendations to the board.
8. Old Business
   a) 2014 Convention Review – Discussion: There were 190 registrants, 5 down from last year and 4 guests. Cedar Shores charges us $0 for the convention center, the only charge for the rooms and food. The rooms are $75, there are 99 and we us them all. Scholarship students are staying offsite this year. Don Jacobson asked about the use of the cabins, but they are winterized.
   b) 2014 Operating Budget – General discussion: Currently we lose money on the lifetime and technicians at their current dues. We do not want to raise the dues of the "future" members, and keep the LSIT and technician dues as low as possible to keep interest. They are the future. Discussion was also had on the possibility of the newsletter to be posted on the website and not to mailed, to save money on printing and mailing. Suggestions: A questioner for an internet or paper copy could be sent out. Many companies have multiple member, therefore, multiple newsletters mailed to their office. We could send one copy to those offices to be shared, and eliminate the excess. ++Motion by Berkland to approve the budget, 2nd by Lippincott. Motion approved.
   c) 2014 Election of Officers
      1) President-Elect M. Ben Lamke
      2) Secretary Eric Howard

      ++Motion by Aas to approve officer nominations. 2nd by Lippincott. Motion approved.
   d) Minnesota Land Surveyors Foundation–Representative to replace Mark Johnson. Mark has moved to Omaha, Seeking interest parties. A nominating committee will be formed after Diane goes to Minnesota conference.
7. Chapter Reports
   a) West River Chapter – Ben Lamke: Attended County Auditor's convention and was asked to come back. Ron Fisk suggests an Ad Hoc committee be formed to continue dialog with the register of deeds.
   b) Big Sioux Chapter – Wade Lunders – Wade reports there have been new elections. They are rotating the locations of their meetings to get more of the membership involved. Due to the size of the area the chapter covers would it be feasible to create a Great Lakes Chapter?
   c) Missouri River Chapter – Diane Aas. The only meetings they have had are at the convention. There

are not many surveyors in this chapter. Projects are mentoring program for students.

9. New Business
   a) Southeast Technical Institute Grant – NSPS Student Competition. STI is requesting a $5000 grant. Tom will attend the meetings. ++Motion by Berkland to approve the grant application 2nd by Lippincott. Motion approved.
   b) SDBOTP Recommendation – Discussed previously in Committee Reports item i). ++Motion by Lippincott to have the board send a recommendation for Steve Peters. 2nd Berkland. Motion approved.
   c) NCEES – Young Professional Award/Focus Group for 2014 Convention. NCEES is seeking a group of young professionals to fund them to attend the 2014 NCEES Annual Meeting to conduct a focus group to get reactions about their opinions and ideas regarding licensure and promote the value of licensure. Tom is seeking a recommendation for a young surveyor from South Dakota to attend. The meeting will be August 20-23, 2014 in Seattle.
   d) SDSM&T Grant – Mark Lippincott / SDSM&T CEE department is requesting a $2585 grant for data collectors for ongoing surveying education. Steve Peters asks how we will be recognized for giving the grant. Discussion follows. ++Motion by Berkland to approve the grant application 2nd by Aas. Motion approved.
10. Next Meeting – To be announced.
11. Meeting adjourned at 11:05am. (central)

Respectfully Submitted
Eric Howard
SDSPLS Secretary

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*(**Surveyors & Title** – continued from Page 5)*

surveyor in deciding what needs to be reported or can be safely ignored. A title analysis when contemplating the detail involved in surveying services and reporting problems discovered comes down to the answer to two simple questions: 1) Would the reasonable buyer be concerned with the problem? 2) Will the condition or problem affect the value of the property? (Both questions are interrelated.)

With these two questions in mind, the surveyor would not likely be faulted for failing to report that the neighbor's driveway cuts across the corner of the client's property (by 0.8 feet). On the other hand, the failure of the surveyor to report the neighbor's well head is five feet within the client's property would likely have adverse consequences on the marketability of the client's title and could result in liability to the surveyor. (Although the surface area of both encroachments is approximately the same.)

Hopefully the concepts explained in this article will help surveyors understand title concerns and how surveying services relate to and may impact on the title.

† Knud is a professor in the college of engineering at the University of Maine. He provides consulting services in the area of alternate dispute resolution, boundary disputes, easements, and land development.

SDSPLS – ANNUAL MEETING
Friday, January 10, 2014
Cedar Shores Resort – Chamberlain, SD

This report is subject to BOD approval.

1. Call to order at 4:17 (CST) by President Meyer.
2. Acceptance of Agenda: ++Motion by Tom Berkland to approve the agenda, 2nd by Larry Holton. Motion approved.
3. Secretary's Report – Eric Howard. Approval of minutes for the 2013 meetings submitted- pages 3-10. ++Motion by Kristi Goehring to approve minutes, 2nd by Diane Aas. Motion approved.
4. Treasurer's Report – Steve Thingelstad. Written report submitted for review page 11 of the Annual Report. ++Motion by Diane Aas to approve the report, 2nd by Dan Eisenbraun. Motion approved.
5. President's Report – Eric Meyer: As submitted on pages 12 in the Annual Report.
6. Committee Reports:
   a) Education Committee – Kristi Goehring: Written report located on page 13 of the Annual Report.
   b) Legislative Committee – Gary Andersh: Written report located on page 14 of the Annual Report. Gary adds he will let it be known if anything arises.
   c) DPC Report – Don Jacobson: No meeting yet this year. Don added the biggest issue that may arise would be the access to water ways on private land. Don will register as a lobbyist this year and be watching for this.
   d) Standards Committee – Dean Scott: No activity this year. Dean promises a fresh set of standards next year, and is happy to receive any additional input.
   e) Public Information Committee – Mark Lippincott: No report. Eric Meyer states a grant has been given to SDSM&T and to make sure recognition goes into the alumni newsletter.
   f) Membership Committee –Ron Fisk: Membership Summary located on page 15 of the Annual Report.
   g) NSPS - Tom Berkland: Written report located on page 16 of the Annual Report.
   h) West River Chapter – Ben Lamke: Written report located on page 17 of the Annual Report.
   i) Big Sioux Chapter – Nathan Nielson: Written report located on page 18 of the Annual Report.
   j) Missouri River Chapter – Diane Aas. Written report located on page 19 of the Annual Report.
   k) Trig Star – Written report located on page 20 of the Annual Report.
7. Old Business – None.
8. New Business
   a) 2014 Proposed Operating Budget – Submitted for review on pages 21-22 of the Annual Report. Discussion follows: Dan Eisenbraun asks how much we are earning on the mutual fund. Janelle Finck responds she does not have the specifics, but is growing nicely. The funds are with First National in Yankton. Janelle will get back with specifics later. The 2013 grants have been removed from the budget and newly approved grants and scholarships have yet to come out. ++Motion by Dan Eisenbraun to approve the 2014 Operating Budget, 2nd by Dean Scott. Motion approved.
   b) Bylaw amendments – Bill Philips states LSIT (Land Surveyor In Training) is now referred to as LSI (Land Surveyor Intern). ++Motion by Ron Fisk that LSIT (Land Surveyor In Training) be change to LSI (Land Surveyor Intern) as defined by the SDBOTP, 2nd Bill Philips. Motion approved. ++Motion by Dean Scott to approve the Bylaws with change of the previous motion. 2nd Gary Andersh. Motion approved.
   c) Election of Officers – The Board of Directors have nominated the following members for the listed offices:
      1) President-Elect Melvin B. Lamke
      2) Secretary Eric Howard

      ++Motion by Tom Berkland nominations cease and a cease and a unanimous ballot be cast, 2nd by Ron Fisk. Motion approved.
   d) NCEES – Young Professional Award/Focus Group for 2014 Convention. NCEES is seeking a group of young professionals to fund them to attend the 2014 NCEES Annual Meeting to conduct a focus group to get reactions about their opinions and ideas regarding licensure and promote the value of licensure. Tom is seeking a recommendation for a young surveyor from South Dakota to attend. The meeting will be August 20-23, 2014 in Seattle. Tom is requesting solicitations for young surveyors wanting to attend. Currently, there are no criteria set, but the board would like to nominate a LS under the age of 35. Not a lot of information has been given to Tom on this yet.
9. Next Meeting: Annual Meeting, January 9, 2015 at Cedar Shores Resort – Chamberlain.
10. Meeting adjourned at 4:36 pm. (CST)

Respectfully Submitted

Eric Howard,
SDSPLS Secretary

DATES TO REMEMBER

2015 SDSPLS Annual Convention

January 8, 9 and 10, 2015

Cedar Shore Resort – Chamberlain, SD

For reservations call: 1-888-697-6363

Thoughts on the Use of Machine Guidance Technology in Construction

By: Card C. de Baca, PLS

In my practice I work with several construction firms that use various machine control tools. I find myself increasingly involved in aspects of machine control that I never anticipated. Of course I work to establish the local datums, ground control site calibrations, etc. And I build digital terrain models (DTMs) from a variety of sources including paper plans, digital plans that need a certain level of 'clean-up', and field topo of existing surfaces that will be offset or otherwise modified. But I also help calibrate the vertical offset on machinery, troubleshoot receiver and radio problems, and even help technicians who are hundreds of miles away, diagnose and solve various problems with the equipment by virtue of usually being the on-site person most familiar with how the process works and the terminology involved. I train contractor staff on the use of the rover, and how to collect and download topo data (which I then process for them). I have also had to spend time reverse-engineering how another firm's grade setter developed a bad site calibration. (Note: I did this because the client incorrectly assumed the grade setter was right and I was wrong.) I look at site control and building DTMs as 'duties' but I look at all these other functions as 'opportunities'. *Please note these are only opportunities if you are willing to learn how this stuff works and market yourself accordingly.*

As a professional surveyor I must say that the manufacturers and vendors of this technology are certainly doing me (and you) no favors. Until fairly recently you could go to the website of any of the big manufacturers and see statements like this:

> "[Machine Guidance] reduces the requirement for survey staking and support. Dozers can move dirt, clear land, build dams and ponds without grade staking." *(Leica website 2010)*
>
> "... No waiting for stakes to be set." *(Spectra website 2010)*
>
> "Spend more time being productive and less time waiting for surveying and grade checking." *(Trimble website 2010)*
>
> " ... is not only accurate to plus or minus one tenth of a foot, but it's also an incredible time saver! There's virtually no staking or re-staking required because [it] works right from site plans and satellite positioning data. *(Topcon website 2010)*

So how does it feel to be a roadblock to progress?

Machine Control technology is fast eliminating the need for survey stakes. While survey firms are reacting to this by downsizing, they are missing opportunities to be involved in the process. However, the use of machine control for site grading, excavation, curb and gutter, etc., still requires, (or *should* require) surveyors at key places along the continuum of tasks. In the absence of surveyors asserting themselves into the process, the industry is evolving toward software and hardware solutions that can be picked up and used by non-surveyors. In some states, the legal definition of surveying includes some or all of the functions performed when using machine control for site grading. Certain practitioners may be in violation of the law without being aware of it, (though not in Nevada, as long as the use in only for construction).

The ACEC (American Council of Engineering Companies) survey group, COPS (Council of Professional Surveyors) produced a position statement on the role of the surveyor in machine guidance applications. The NSPS (National Society of Professional Surveyors) has produced a similar position statement. I refer you to their websites for the exact language. To summarize both, a professional should be responsible for assembling the DTM and site control/calibration used with the technology. Is this always the case? As John Wayne used to say, "Not hardly." It is safe to say that this is the exception rather than the rule in practical application of machine control on a typical job site in many parts of the United States, including Nevada.

Let me just barely touch on some of the considerations involved in going from a digital terrain model to a finished surface on a construction site:

- A model with sufficient data density to provide accurate grading without so many data points that the cutting edge "chatters".
- An accurate and reliable site calibration to use.
- A permanent benchmark over which the operator can place the cutting edge to check the elevation reading (with some regularity).
- Proper training for the operator.
- Knowledge of the effects of using a vertical offset to a provided surface.
- Calibration of the inertial units at each joint so as to compute the relationship from antenna to cutting edge (shovels and track hoes).
- Awareness of the loss of cutting edge requiring daily re-calibration (graders and dozers).
- PDOP, HDOP, RMS, residuals and other concepts that the blade operator has never heard of...

(Continued on Page 10)

The Selling of Our Professional Souls

By: Dennis J. Mouland, PLS

The profession of land surveying is a strange mixture of science and law: It involves the ability to interpret either of those in the context of the other. Many other professions cannot do this, including many lawyers, engineers, and title insurance staff. The capacity to think in both technical measurement terms in a spatial relationship, and then overlay it with complex laws and legal principles is what makes the profession so enjoyable. I am quite sure none of us are in it for the big money!

During my career I have often seen persons who use our data in some capacity; who try to allow one of these elements to dominate the other. A classic example is the person who thinks all measurements are perfect, and therefore all bearings and distance in a deed must be true. Thus, they attempt to annul any legal considerations in a boundary location. Some GIS personnel find themselves in this category if they have not had broader training in the law.

What has scared me more, however, is when I see those in our own profession selling out one or both parts of this specialty we claim. This can come in one of two ways:

First, there are those who believe their measurements are so precise, that they no longer rely on the law or legal principles that guide us in actual boundary determination. In other words, it's all about measurement. Ignore the evidence, intent of the deed, previously done surveys which were well done for their time. Finding a plethora of monuments at a corner point is one classic example of this flawed thinking. And since many of our graduates from Universities are engrained with this approach, it is no wonder we have these issues increasing as time goes by.

A second way we sell out our own profession is the thinking that deeds, records and previous surveys are all second class information; what the clients occupy is all that matters. While occupation can be a part of the evidence, and the law allows for such things as acquiescence and adverse possession, we cannot throw out our measurements and the record evidence that created the lines we want to retrace. The fact that a portion of our profession is too lazy or incompetent to search for and identify written and field evidence does not truly change who we are and what it is we are supposed to be doing.

In the first example we find us selling out the law for high-order measurements, adjustments, and the inability to accept what anyone else before us has ever done. Such a "geodetic approach" to boundaries is dangerous; the law must not just be momentarily considered ... it must be used with all its weight.

The second example is one of us selling out the law and measurements, and simply becoming "professional as-builters." If what they occupy is all that matters, why do we have deeds, original surveys, title insurance and resurveys? We should just license the fence builders and let it go; no surveyors needed anymore.

Either one of these approaches, or mixtures of the two, is a complete sell-out of our professional souls. It shows a great deal of ignorance of how land ownership rights work and what our role in them actually is. It doesn't just cheapen or cut out real surveying, it robs people of their fundamental land ownership rights. Arrogant measurers or as-builters do no one any good. We are licensed to protect those land ownership rights.

I encourage all of us to be total experts in the science and measurements, as well as the law involved. We need to practice both on every survey. Looking for justification to short-cut surveys and the evidence used to create and sustain real property rights is not part of who we are, and should not be tolerated by the rest of the profession. Don't sell your professional soul!

As seen in Missouri Surveyor, September 2013

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*(**Machine Guidance** – continued from Page 9)*

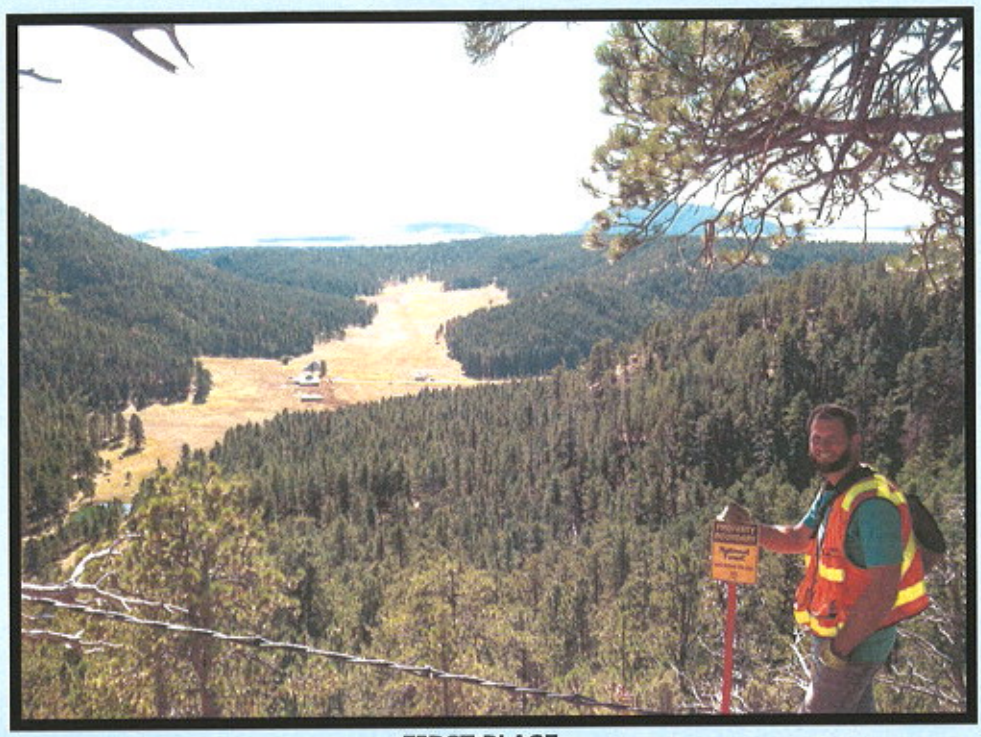
We're not going to go back to the way things were and you ignore this trend at your own peril. The toothpaste is pretty much out of the tube. There is a place in machine control for you and me, but not without some affirmative promotion. The contractors have been sold a technology that purports to reduce or eliminate the need for surveyors, and when they shelled out the money to buy the equipment, that is what they expected to see.

In addition to greatly reducing the need for construction layout, which impacts our bottom line, the contractor now absorbs the lion's share of liability for design and layout defects. And a cottage industry of non-licensed individuals and firms has arisen to provide services to contractors much more cheaply than we can. Not using professional surveyors to build and maintain the DTM's and the site control potentially harms the public in a way that should get the attention of the Board of Professional Engineers and Land Surveyors. In my opinion, now would be a good time for NALS [Nevada Association of Land Surveyors] to consider sponsoring legislation to refine the definition of the practice of Land Surveying to include certain aspects of machine control application.

"Why can't we ever match you guys?"

As seen in The Nevada Traverse, Vol. 40, No. 3, 2013

PHOTO CONTEST WINNERS



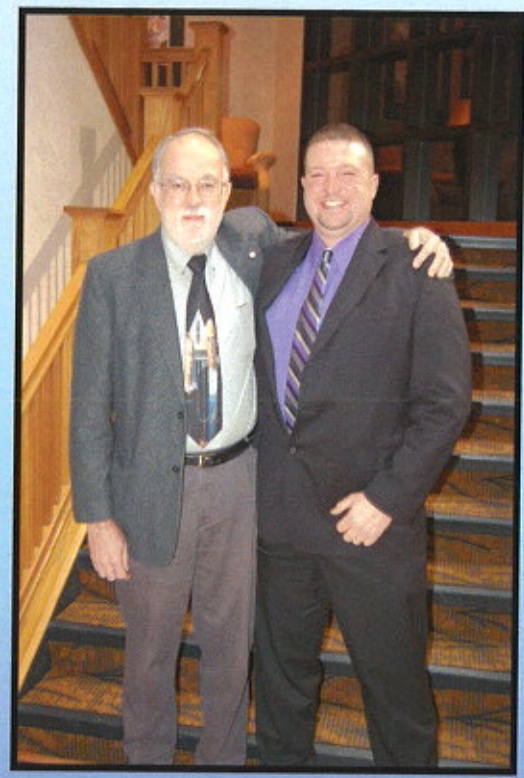
FIRST PLACE:
Brandon Huppler of Interstate Engineering - posting USFS boundary in Crook County, WY

SECOND PLACE:
The N 1/4 corner Section 9, T150N, R101W - set June 1900 in Alexander, ND and recovered by Ulteig Engineers

THIRD PLACE:
A new employee (sporting appropriate safety colors) joined the DGR Engineering crew while staking at the new County Fair Grocery Store in Dell Rapids, SD

Group review & discussion during the IBLA Review presentation by Ron Scherler

Scholarship recipients help out with another successful auction. (left to right) Philip Kafka - LATI, Cole Van Liere - STI, Jenifer Brooks -STI, Travis Jordan - SDSU, James Cohoon - STI and our auctioneers Maynard Jensen and Eddie Houska



SLSI NSPS Governor Richard Leu (left) and 2013 SDSPLS President Eric Meyer

Paul Horsted entertained us on Friday evening with his historical photo comparisons of "The Black Hills - Yesterday and Today"

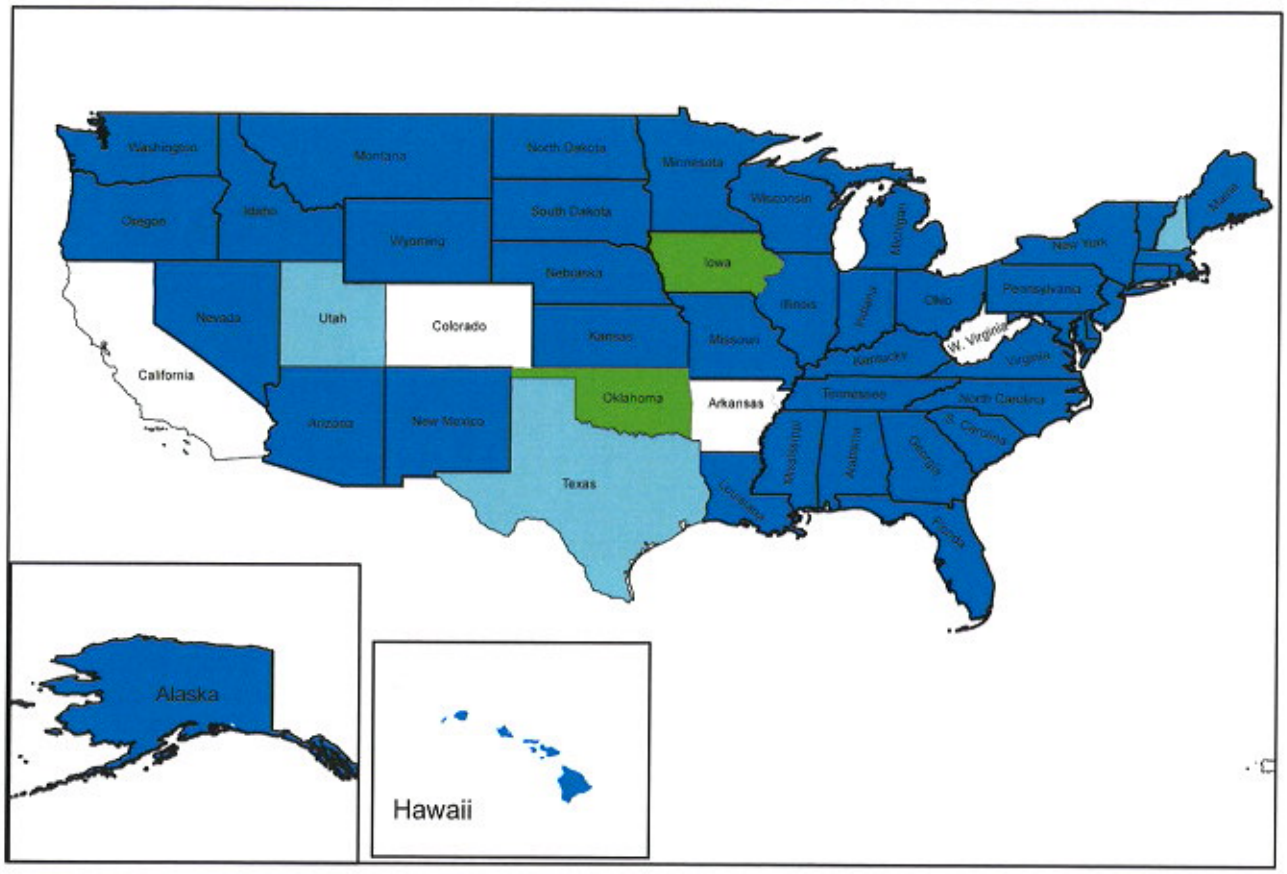
NDSPLS President Steve Langlie (left) and 2013 SDSPLS President Eric Myer

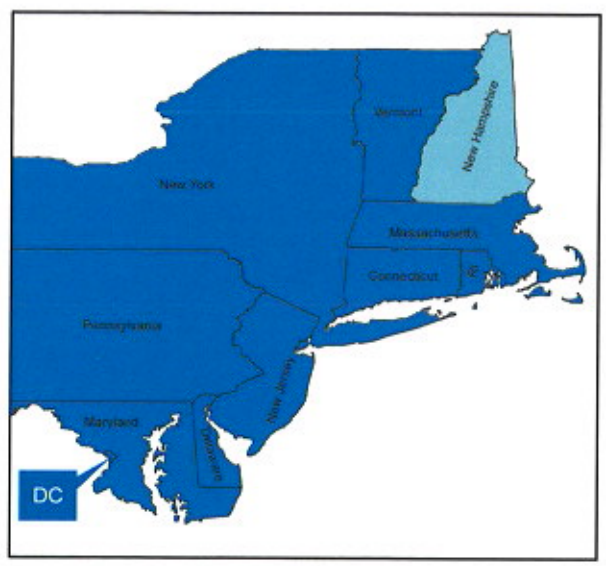
2014 SDSPLS Board of Directors
(left to right) Past President Eric Meyer, NSPS Governor Tom Berkland, Secretary Eric Howard, Missouri River Chapter President Fred Leetch, President-Elect M. Ben Lamke, and 2014 President Diane Aas (not pictured, Big Sioux Chapter President Wade Lunders and Treasurer Steve Thingelstad)

MSPS President Harold Peterson (left) and 2013 SDSPLS President Eric Myer

Joshua Alexander closed out the convention on Saturday morning with an interesting "Introduction to Riparian Surveying"

NSPS 100% Membership Participation





Legend

- Signed MOU
- Membership Approved
- Board Approved
- Positive Response
- Rejected
- Negative Response
- Evaluating

Date: 1/27/2014

Note: The process for a state society to approve the NSPS 100% Membership Participation Plan varies. Some states only need board approval, while other states need membership approval. The categories for this map reflect the current status of the state society as reported.

The Land Surveyor's Guide to the Supreme Court of South Dakota

Part 5 – 1896 to 1898

This article represents the fifth in a series of excerpts from a book prepared by South Dakota licensee Brian Portwood. The complete book is available for review in PDF form on the SDSPLS website and covers 120 years of historic South Dakota cases, answering fundamental land rights questions of potential interest to land surveyors, which are being presented in chronological order here in Backsights & Foresights.

Can distance calls create gaps between lots?

Novotny v Danforth (1896)

Resuming our study of the Court's treatment of issues arising from legal descriptions, we here encounter a case that was really focused upon the consequences of a construction fiasco, but which also provides a fine example of the manner in which the Court handles descriptions that contain conflicting language. One of the many problems frequently noted when reading legal descriptions is that many grantors, inexperienced in creating sound legal descriptions, foolishly attempt to define property that they intend to convey using terms, phrases and clauses that have the effect or overlapping or duplicating each other, failing to observe the fundamental rule that simplicity and clarity are of great value in creating proper legal descriptions, while excess and redundancy are of no benefit and can even be harmful. Here the Court wisely rectifies such a problematic description, in order to disarm an attacker whose assault upon the description in question points to the meaning that he would personally prefer to derive from it, to suit his own purposes, which as we will learn, as we move through the decades, is not a tactic that the Court finds persuasive. While it proved to be unnecessary for the Court to reform the description in contention in this case, the Court had already addressed the concept of description reformation in principle by this point in time, in the 1891 case of MacVeagh v Burns. MacVeagh acquired an unspecified tract in Deadwood, which unknown to him contained a description error, since the tie to the POB of his description called for the wrong corner of a nearby mineral claim, and for unknown reasons Burns challenged the validity of MacVeagh's ownership, based on this mistake, which amounted to a single incorrect digit, claiming that MacVeagh's description was statutorily void due to the presence of that error. Citing description reformation cases from Florida, Illinois and Indiana, the Court very wisely adopted the position that any description error is subject to correction, if it can be shown to have been a genuinely mutual mistake, stating that such corrections are entirely within the law, since they simply "make the deed express just what the parties to it originally intended", and the Court has remained open to such appropriate description reformation ever since. In Laird-Norton v Hopkins in 1894 however, Laird-Norton sought to foreclose a lien upon a typical city lot that was owned by Hopkins, but as an apparent result of carelessness in the description of the property to which the lien applied, the description incorrectly stated the name of the subdivision containing the lot. Since the erroneous description had been prepared either by or for Laird-Norton, the Court upheld a lower court decision that the lien had been rendered utterly null and void by that mistake, on the basis that such a unilateral description error is not typically subject to correction, and moreover, the party who was responsible for the existence of such an error must bear the consequences of it. The rule thereby adopted by the Court, that the party who either created a mistaken description, or directed that it be created, must suffer any loss resulting from any inadequacy subsequently discovered in it, usually impacts grantors, who are responsible for the legal descriptions used in most conveyances, but it can also adversely impact a grantee, if he agrees to accept the burden of providing the description or descriptions required for a given conveyance.

> **Prior to 1896** - A corporation known as Christ's Church owned Lots 10 & 11 in Block 25 in Yankton, which were apparently typical adjoining rectangular platted lots. The width of the lots is unknown, but they had been platted as 150 feet in length, with their long axis running east and west. Lot 10 was the southerly lot, and it was bounded on the south by a city street, and bounded on the north by Lot 11, so the two lots comprised the southerly end of the block. The church decided to dispose of these lots, which were apparently vacant, at an unspecified time, and subsequently sold a portion of the west half of both

(Continued on Page 16)

*(**Supreme Court** – continued from Page 15)*

lots to Novotny, and a portion of the east half of both lots to Danforth. Whether the church retained the remaining portions of the platted lots or sold them off to other parties is unknown, but this was not a factor in the eventual controversy between these two men, since the dispute that subsequently arose was limited to the properties acquired by Novotny and Danforth. Novotny erected a brick building on his portion of these two lots, placing the face of the east wall of his building on the dividing line between the east and west halves, as closely as he could determine the location of that line. There is no indication that the line between the lands of Novotny and Danforth was ever surveyed on the ground, but the physical location of that line was never disputed, since Danforth accepted the east face of Novotny's building as correctly marking the boundary between their properties.

1896 - Danforth decided to erect a building on his land, and he wanted to place it directly against Novotny's building, but he wanted to have a deeper cellar, which would extend well below the elevation of Novotny's existing foundation, and he realized that this would make the construction of the proposed building potentially dangerous to Novotny's building, so he asked Novotny to approve the proposed work. Novotny approved the construction of Danforth's building, directly up against his own building, and in addition, he asked Valentine, who was Danforth's building contractor, to extend the depth of Novotny's cellar, to match the deeper elevation shown on Danforth's plans, and Valentine agreed to do so. The excavation work for Danforth's building was successfully completed, without any damage to Novotny's building, but when Valentine began the additional excavation that had been requested by Novotny, directly beneath the east wall of his existing building, the entire east wall collapsed. Evidently no one was hurt in the collapse, but Novotny was obviously upset by what had happened, so he decided to file an action against both Danforth and Valentine, seeking compensation for the damage that had been done to his building. In the wake of the collapse, and in apparent preparation for the coming legal battle, Novotny had Lots 10 and 11 surveyed, and the survey revealed that the lots were actually 151.1 feet in length, rather than 150 feet as platted.

Novotny argued that Danforth and Valentine were fully responsible for the damage that his building had suffered, and should therefore be required to pay for it's complete reconstruction. In addition, since Novotny had discovered from the survey that the original lots were actually longer than their platted length, he argued that based on the legal descriptions held by both Danforth and himself, a gap actually existed between their properties, so the excavation work that had been done by Valentine for Danforth's building amounted to trespassing on the gap between their lands, and this act of trespassing was the actual cause of the destruction of his wall. Danforth and Valentine argued that they were not responsible for the damage to Novotny's building, because he had approved their work, and in fact it was the expanded scope of the work, which had been ordered by Novotny himself and had been done under his instructions, that had been the true cause of the damage to his building, so they could not be held liable for any of the damage. Danforth further argued that despite the excess in the length of the lots, no gap ever existed between his property and that of Novotny, so he was not guilty of trespassing, and all of the excavation work that had been done by Valentine at his request was done on Danforth's own property. The trial court agreed with Danforth that no gap existed between the properties in question, so all of the excavation work done for him had been properly and legitimately executed on his own land, also deciding that Novotny himself was fully responsible for the loss of his own wall, so he was entitled to no compensation from either Danforth or Valentine.

The primary issue in controversy in this case was of course the question of who was really responsible for the unfortunate incident that had taken place, and the Court agreed with the lower court that it was Novotny's own foolish idea, directing Valentine to extend the intended excavation directly under his own existing building foundation, that had been the real cause of the damage that Novotny had sustained, so he could not pass the responsibility for the results of his own poor decision off onto either Danforth or Valentine. The building plan proposed by Danforth, and put into effect by Valentine, although perhaps somewhat risky, was not illegal in any respect, and it could have been carried out successfully, if Novotny had not seen fit to interfere, in an attempt to take advantage of their work for his own benefit, so the Court quite justifiably upheld the lower court decision against him. This incident alone, and the resolution of Novotny's claim, would be of little interest or relevance to land surveyors, since no surveyors were accused of any kind of involvement in the construction work that resulted in the incident, if Novotny had not attempted to support his position by bringing the legal descriptions of the parties into play. His decision to do so however, provided

the Court with a superb opportunity to clarify the manner in which deficiencies and discrepancies in legal descriptions are evaluated and adjudicated. The Court's analysis of the two legal descriptions at issue, in the context of the actual circumstances, provides an excellent demonstration of how the Court employs both legal and equitable principles as tools, to resolve all such conflicts in accord with the ends of justice. Cognizant that the lots were originally believed to be 150 feet in length as platted, by the grantor of both Novotny and Danforth, it was perfectly clear to the Court that their prior corporate owner, upon deciding to sell off the lots, had intended to make 6 smaller parcels out of the 2 platted lots, by splitting the total of 150 feet of frontage along the south side of Lot 10, into 6 equal divisions of 25 feet each, all running back to the rear of the new parcels, at the north line of Lot 11, in order to optimize their profit in disposing of the land. Neither the church, acting as the grantor, nor any of their grantees, including Novotny and Danforth, had realized that the platted lots contained any amount more or less than 150 feet, all of the parties had proceeded on the basis that each conveyance contained a nominal 25 feet, and just as importantly, that each 25 foot parcel constituted an equal share of the original lots, which was bounded by the adjoining parcels on each side of it, so no gaps or overlaps had been either anticipated or intended. Since the intent of all of the parties to the conveyances that had created the new parcels was fully evident, the plain task of the trial court had simply been to implement a proper resolution of the conflict, in accord with the intent that was clearly manifested in the relevant descriptions, which the Court proceeded to assess as follows:

> *"The plaintiff's deed to his premises described the property as the E. 1/3 of the W. 1/2 of Lots 10 and 11 in Block 25 of the City of Yankton. Danforth's deed to his property describes his lot as the W. 1/3 of the E. 1/2 of Lots 10 and 11 of Block 25 ... but ... In addition to the general description in Danforth's deed is the following description: Beginning on the north line of Third Street, at a point fifty feet westerly from the southeast corner of said Lot Ten ... The plaintiff therefore contended that there was a strip of land 6 or more inches in width between the property of the plaintiff and Danforth's property, and, consequently, Danforth was not a coterminous owner, and therefore, when excavating next to plaintiff's wall, he and his co-defendants were trespassers ... the second or specific description in the deed described land to a portion of which the party conveying had no title, and omitted a portion to which the grantor had title. The first description in the deed was correct, and conveyed exactly what the party had to convey, and doubtless, intended to convey ... They no doubt supposed that the description by metes and bounds covered the same property as the first clause in the deed, and it would have done so had the lot been only 150 feet in length ... the deed did actually carry out the intention of the parties by the first description. In construing deeds ... it is the duty of the court to carry into effect the intention of the parties ... The court, therefore, very properly disregarded the second description in the deed, that clearly did not express the real intention of the parties ... Novotny and the defendant Danforth are to be regarded as coterminous owners."*

The most essential principle exemplified and put into practice by the Court in this case, is the concept that intent is paramount, which we have already previously noted in our review of the Evenson case, and which we will see very frequently appear as a decisive factor in many future cases. This dominant principle applies not only to the resolution of conflicts relating to descriptions, but indeed to virtually every aspect of land rights, including every situation involving a conveyance or contract of any kind, and it is particularly applicable to all interactions between a grantor and a grantee, since intentions play a vital role in the critical determination of their good faith. The rule applied by the trial court, and approved here by the Court, to effectively strike out and negate the offending portion of Danforth's description, is known as the rule of surplusage, which dictates that nothing following an adequate description can operate to surreptitiously destroy, or even erode, the foregoing legitimate portion of the description, so any subsequent language that has any such effect can, and in fact must, be ignored and discarded. This useful tool of law, which serves to protect grantees from deception through the use of technical language in the preparation of legal descriptions, like most of it's brethren, has it's origin in common law principles of equity, but it had already been codified into the statutes of South Dakota by the time of this case. The thrust of the surplusage rule, as it was employed here, is to counteract any potentially negative effects of the equally well known rule that the particular typically controls over the general, which has often been cited in support of the description form known as metes and bounds. This case very poignantly illustrates however, that a metes and bounds description will not always control, because bearings and distances will not

(Continued on Page 18)

*(**Supreme Court** - continued from Page 17)*

be allowed to control over general language, in those instances where the general language more accurately embodies the true intent of the parties. Here, Novotny attempted to point to the particular portion of Danforth's description as controlling, asserting that the first part of that description should be ignored, but the Court readily saw that Novotny had taken this position opportunistically, only because he supposed that it would operate to his advantage, so the Court wisely upheld the surplusage rule, sweeping aside the courses and distances, and allowing each lot to absorb it's proportional share of the excess length, preventing the creation of any gaps. The position taken by the Court in that regard here is highly typical of the efforts of virtually all courts, the objective always being to eliminate or negate the value of any description language that tends to create potentially troublesome gaps or overlaps, by the use of whatever judicial device may most expediently accomplish that purpose. The obvious lesson for surveyors here is that the unnecessary use of the metes and bounds description form can very often do more harm than good, and this a perfect illustration of a situation in which that was precisely the case. The false 50 foot distance, unwisely used to define the POB of Danforth's description, created a window of opportunity, that invited Novotny to attempt to use that part of Danforth's description as a weapon against him, which if not for the wisdom shown by both the trial court and the Court in properly resolving the matter, could have been unjustly damaging to Danforth.

Also in 1896, on the subject of description content, the Court emphasized the need for correctness in describing property conveyed by tax deed, in the case of Van Cise v Carter. Van Cise had acquired a tract a few miles outside Lead City that had been patented under the description "Santa Fe Load Mining Claim, Lot No. 402, embracing 8.80 acres", but he had neglected to pay taxes on it, and it had therefore been conveyed to Carter by tax deed. For unknown reasons however, the assessor had treated the tract as if it were located in Lead City, and the original description of the tract was not used when the tax deed was prepared, instead the tract was described in the tax deed as "The Santa Fe Load, situated in School District No. 75 and in Road District No. 3". The trial court found this description to be accurate, as far as it went, and therefore acceptable, but the Court categorically rejected it, declaring the tax deed void, and restoring ownership of the tract to Van Cise, stating that any description which fails to identify the subject property by reference to the PLSS, or by reference to a platted lot and block, or by metes and bounds, cannot stand as a valid legal description, for uncertainty of location, characterizing the description in question as "confusing, misleading and deceptive". Again stressing the critical need for both correctness and completeness of descriptions used for purposes of tax conveyances, the Court struck down another description as indefinite and uncertain in Turner v Hand County in 1898. In that case, Turner was the owner of the south half of the southwest quarter and the south half of the southeast quarter of a regular section, but in both the county tax records and the deed by which the county allegedly acquired the land for delinquent taxes, it was described only with a single continuous string of figures reading "s2se&s2sw" followed by the standard section, township and range designations. Criticizing this particularly cryptic notation as "intolerable", the Court also reversed this lower court ruling, holding that the tax deed prepared by Hand County was a nullity, and Turner was therefore still the owner of the inadequately described land. Yet again in 1902, another highly problematic description came to the attention of the Court, in the case of Stokes v Allen, this time in the context of a description exception necessitated by the presence of a railroad right-of-way evidently passing through the subject property. The description of the land at issue in this instance, which had been conveyed by Codington County to Allen by means of a tax deed, read only "SW4NE4&W2SE4 Less R.W. D.C. Ry." with no designation of section, township or range. Indicating that even if the section, township and range were not absent, the description would still be void, because the text that was intended to represent the railroad right-of-way exception was "unintelligible", the Court upheld the lower court decision, which had invalidated the description, allowing Stokes to regain the land in controversy. After several years of such harsh criticism from the Court for their weak description efforts, those responsible for preparing proper descriptions eventually began to get the Court's message, and thanks to the relentless drumbeat hammered out by the Court, demanding descriptions of optimum clarity, the era of modern legal description standards was finally approaching.

Can a grantee rely upon boundary statements by a grantor?

Roberts v Holliday (1898)

While many disputes and other issues concerning boundaries of land often arise between owners of adjoining lands, whose chains of title are completely

unrelated, as surveyors are well aware, a high percentage of all boundary conflicts actually take place between parties whose titles are related in some way. For example, one of the most common scenarios in which boundary problems are likely to occur is where one party has divided their land in some manner and then conveyed the various parts of it to different parties, resulting in controversy between two or more of the grantees, over where their mutual grantor intended their boundaries to be. In such cases, the battle takes place between the grantees alone, with no involvement of the grantor, often long after the grantor is dead, so the grantor has no stake in the outcome, even though the grantor was ironically the party who created the problem, and we will later review cases of that nature. Another very common source of boundary disputes however, is poor or inaccurate communication regarding boundaries between grantors and their grantees, which can result either in immediate problems that cause disagreements between the original grantor and grantee, as we will see in this case, or in latent boundary issues that remain undetected for many years, but eventually arise to plague and victimize successors of the original grantor and grantee. The various aspects of the relations between grantors and their grantees are undoubtedly among the most vital and important factors in the adjudication of land rights, and such relations are incessantly under consideration by the Court, as it endeavors to insure that the true intentions of the original parties are implemented, through the wise application of the appropriate legal and equitable principles provided by the Court. For that reason, several cases featuring conflicts between grantors and grantees, over both boundaries and easements, have been included in this book, to bring land surveyors to a fuller understanding and appreciation of the significance of the acts of such parties, and the potential impact that all of their acts and omissions have upon their own land rights, and just as importantly, the rights of their successors, who as the Court often reminds us, simply stand in the shoes of their predecessors. In the case we are about to review, an additional factor of interest to land surveyors, as professionals operating in the field of land rights, is also present, since the grantor in this case is represented by an agent, who becomes a defendant himself, as a result of actions that he has taken on behalf of the grantor. As previously mentioned herein, the Court has never dealt directly with the specific question of professional negligence or professional liability in the context of a particular survey or a particular surveyor, but many other professionals have been held liable for their acts or omissions when communicating with innocent parties about land rights, such as boundary locations in this instance, making the position on the legal significance of all such communication taken by the Court potentially relevant to surveyors as well.

1893 - Warren was the owner of an unspecified quarter section located in Brookings County, consisting of undeveloped land with a railroad right-of-way running through it, part of which was suitable for agricultural use, but part of which was too rocky to be useful. Warren evidently lived elsewhere, and she informed Holliday, who was a real estate agent based in Brookings, that she would like to sell the quarter section, so he agreed to attempt to find a buyer for her and show the land on her behalf. Roberts, who was a resident of Minnesota, arrived in Brookings and informed Holliday that he was interested in acquiring some good agricultural land in the area. Holliday took Roberts out to see Warren's land, but Holliday was uncertain as to the exact location of the boundaries of the quarter, apparently never having seen Warren's land previously himself. The two men apparently made no attempt to locate any of the corners of the quarter section, they simply drove to a point somewhere near the center of the quarter, and attempted to estimate the location of it's boundaries from that single vantage point, since the land was open enough to be fully visible from that spot. Holliday evidently had only a general idea that the railroad ran northerly through the easterly part of the quarter, yet he ventured to point out a certain fence as marking the west boundary of the quarter, and he then also told Roberts that the quarter extended only a short distance east of the tracks. The boundaries pointed out by Holliday were very attractive to Roberts, since Roberts could see that the land east of the tracks was unattractive, being rough, hilly and rocky, so based on the boundaries pointed out to him, Roberts agreed to buy the land, and he paid Holliday the asking price. Roberts then returned to Minnesota, Holliday forwarded the money paid by Roberts to Warren, less his commission, Warren executed a deed to Roberts, and Roberts soon returned to South Dakota to take possession of the land that he had bought. Roberts soon discovered however, that Holliday had misinformed him about the boundaries of the quarter. The fence pointed out by Holliday was actually several hundred feet west of the true west line of the quarter, which meant that the quarter actually extended several hundred feet east of the railroad, and included much of the rocky and useless ground. Rather than being comprised entirely

(Continued on Page 20)

*(**Supreme Court** - continued from Page 19)*

of good cropland, as indicated by Holliday, nearly half of the quarter was poor land, which was unfit for the use that Roberts had intended to make of it, so he deeded the quarter back to Warren, who willingly took it back from him, and refunded to Roberts her portion of the money that he had paid. Holliday however, refused to refund the portion of the purchase price that he had retained as his commission to Roberts, so Roberts filed an action against him to compel him to return the balance of the purchase price.

Roberts argued that Holliday had provided him with misleading information, regarding the location of the boundaries of the land to be conveyed, and he had relied fully upon the correctness of the representations concerning the boundary locations made by Holliday, and he would never have purchased the land if he had been correctly informed of it's true boundaries, so Holliday should be required to refund his commission in full to Roberts. Holliday did not deny that he had attempted to point out the boundaries of the land at issue to Roberts, but he argued that if anything he had said concerning those boundaries was incorrect, the error was unintentional on his part, and under the rule of caveat emptor, it was the responsibility of Roberts, as the buyer of the land, to fully verify and substantiate it's true boundaries, rather than simply relying upon what he had been told, so Holliday was under no obligation to provide Roberts with a refund. The trial court ruled that Roberts was entitled to rely fully on what Holliday had told him regarding the boundaries of the quarter, and Roberts was not obligated to make any further inquiry into the actual boundary locations himself, so Holliday was bound to make Roberts whole, and Holliday was not entitled to retain any of the money that had been paid to him by Roberts.

At first glance, the reaction of the typical land surveyor to a situation such as this one, may be to point out that both Roberts and Holliday were clearly negligent, because it was obviously quite foolish for these men to imagine that they could judge the location of all the boundaries of the quarter section in controversy, with any reasonable accuracy, from one spot in the center of it, without ever even looking for any monuments at all, and that is certainly true. However, as most surveyor's realize, people very often attempt to estimate boundary locations, and draw false conclusions about boundaries, based on insufficient evidence, or even sheer speculation, because most people naturally do not have the surveyor's knowledge and appreciation of the danger that can result from doing so, frequently leading to conflicts such as this one, requiring judicial resolution. The Court invariably strives to deal with the consequences of such unwise behavior in a manner that is just and equitable, so the Court always takes the relationship between the parties, and the respective roles they play in that relationship, into consideration, in order to properly determine which party must bear the consequences of any failures or mistakes that were made during the conveyance and acquisition process. In this case, Roberts was a genuinely innocent grantee, completely unfamiliar with the area in which the land at issue was situated. Holliday was evidently also somewhat unfamiliar with the particular section in question, but it was within his area of professional practice, so he bore a distinctly greater burden of knowledge relating to the land itself than did Roberts. Roberts recognized that Holliday was a professional, with experience in land transactions, which is why Roberts had come to him, so when the two men visited the site together, Roberts had the right to count on Holliday to conduct himself as an ethical professional, which required Holliday, among other things, to resist the temptation to make any potentially misleading statements. It may be true that Holliday made no intentionally deceptive statements about any of the boundaries involved, and fully believed everything he told Roberts, but his words operated as an inducement to Roberts, the Court noted, directly influencing his decision to buy the land, which turned out to be of little value. Most critically, the words of Holliday were entirely voluntary, if he had simply said nothing, Roberts would have been compelled to locate the true boundaries of the quarter by some other means, such as engaging a land surveyor, but Holliday voluntarily interposed his own opinion, thereby eliminating the obligation of Roberts to seek further information. If Holliday was actually uncertain about the true boundaries of the quarter, which turned out to be the case, it was his burden as a professional to remain silent, in order to avoid any chance of misleading an innocent party who was clearly relying upon him. The Court had no sympathy for Holliday, and agreed fully with the lower court that his position, attempting to shed his own professional burden, and shift it to Roberts, was utterly groundless and unsupportable:

"A purchaser of real estate is entitled to rely on the representations of an agent ... as to location, and is not bound by the doctrine of caveat emptor to make further inquiries as to its boundaries ... the tendency of modern authority is to encroach upon the old doctrine of caveat emptor, and place reasonable

responsibility upon the seller, there is no merit in the contention that respondent was duty bound to make further inquiry and investigation as to the boundaries of the land ... appellant's representations were the cause of his omission ... Respondent had the right to confidently rely upon every material representation made by the appellant."

Caveat emptor, which translates as "let the buyer beware", is a venerable and useful maxim, intended to encourage prudence and forbearance, on the part of those who might otherwise hastily engage in unwise transactions, but of course it cannot operate as a means of justification for deception of any kind, intentional or otherwise. In the arena of land rights, the modern judicial trend, as the Court rightly observed, has tended to place an ever increasing burden on grantors, while strongly upholding the presumptive innocence of grantees, and this trend has continued during the century or more that has passed since the time of this case as well. Some surveyors, naturally being acutely aware of the frequent occurrence of boundary issues, may be inclined to hold every grantee who fails to obtain a survey prior to acquiring land guilty of negligence, but that perspective, being skewed by the surveyor's specialized knowledge, is not in accord with the law, as this case demonstrates, and in fact no such arbitrary and absolute legal requirement exists anywhere. While it certainly is quite prudent and wise to obtain a survey before investing in any land, doing so is always legally left up to the discretion of the individual, to be decided in accord with the grantee's personal judgment of the circumstances surrounding any particular land acquisition. Courts only very rarely chastise grantees for failing to order a survey of the land that they sought or intended to acquire, and they typically do so only when the need for a survey is especially obvious, such as those instances where no visible or perceptible boundaries exist at all. Most importantly to surveyors, as professionals dealing with land rights, the fact that a grantee chooses not to order a survey, or not to demand that the grantor obtain and provide a survey, does not equate to a lack or an absence of good faith on the part of the grantee, and every purchaser without notice of any potential boundary issues is presumed to be an innocent party, whose land rights are entitled to protection, until the contrary is shown. So while it may be fairly stated that Roberts bargained for a quarter section, and he got a quarter section, properly and legally described, with definite and ascertainable boundaries, that does not mean that he was legally bound to accept any boundaries that were portrayed to him in error, or that one in such a position as Roberts found himself has no legal recourse, and must simply resign himself to accepting the consequences of his failure to verify the boundaries of the land being conveyed to him. Since Roberts had not suffered any permanent loss however, due to the willingness of Warren to accept the reconveyance of the unwanted land from Roberts, such as he would have sustained if he had been unable to reconvey the quarter to Warren for any reason, Roberts could not demand compensation for any further damages, beyond a plain refund of the price that he had paid. Nonetheless, the Court made it clear on this occasion that any kind of misrepresentations concerning boundaries, made by professionals with knowledge of land rights, would be dealt with sternly, and would neither be taken lightly nor be tolerated.

A highly comparable situation soon came to the Court, in the case of Rasmussen v Reedy in 1900, which the Court utilized to strongly reinforce the position that it had taken on the obligations of a grantor and his agents to a grantee in the Roberts case. Rasmussen owned land in Union County, while Reedy owned land in Yankton County, and the parties agreed to exchange their properties. Rasmussen visited the Reedy property to verify that it would meet his need for farmland, and it was shown to him by the father of Reedy, acting on behalf of his son who owned the land. Reedy's father pointed out the toe of a bluff as one of the boundaries of the Reedy property, thereby indicating that it was all good farmland, and Rasmussen conveyed his property to Reedy on that basis, but Rasmussen subsequently discovered that much of the Reedy property was actually on the bluff and was worthless as cropland, so he insisted that the deal was off, but Reedy refused to convey Rasmussen's land back to him. The Court upheld a lower court decision in favor of Rasmussen, allowing him to rescind his conveyance to Reedy and compelling Reedy to reconvey the Rasmussen property. In so deciding, the Court again emphasized, consistent with it's ruling in the Roberts case, that an innocent grantee is legally entitled to fully rely upon any specific boundary locations pointed out to him by either his grantor or anyone acting as an agent on behalf of the grantor. The Court further explained that every misrepresentation regarding boundaries made by a grantor must be treated as the equivalent of fraud, whether that misrepresentation was intentional or not, because anything that induces the grantee to buy the land amounts to constructive fraud on the part of the party providing the incorrect information. In addition, the Court expressly rejected the suggestion by Reedy that

(Continued on Page 22)

*(**Supreme Court** – continued from Page 21)*

Rasmussen was obligated to obtain a survey of the Reedy property, if he cared about the location of the boundaries of Reedy's land, stating that the information that had been provided to Rasmussen by Reedy's father had removed any obligation that Rasmussen might otherwise have had to take any such further action to ascertain the location of the boundaries in question. Had Reedy and his father told Rasmussen nothing about the boundaries of their land, in the view of the Court, Rasmussen would still have had no absolute obligation to obtain a survey of the property that he intended to acquire, but if Rasmussen had then proceeded to convey his land to Reedy, as he had in fact done, based only on Rasmussen's own assumptions about the relevant boundaries, without any misleading information from Reedy or his father, Rasmussen would have been unable to rescind the conveyance that he had made.

Another particularly interesting and unusual case from this time period, Wampol v Kountz, which took place in 1901, also provides great insight into the Court's emphasis on the great importance of equitable factors to all land transactions, and is therefore worthy of note at this point, as a classic example of a conflict centered upon the relative rights of a grantor and the successor of a grantee. A typical quarter section was patented to Kountz in 1872, but in 1873 her father forged her name on a quitclaim deed, conveying her land to himself, and shortly thereafter he quitclaimed the quarter to Marsh, who took up residence on the land. Kountz was an absentee owner who lived elsewhere, and her father was apparently the only actual occupant of the land, so she evidently remained unaware of what her father had done for several years. In 1885 Kountz finally learned, by some unknown means, what her father had done, but she took no action whatsoever at this time. In 1889 Marsh quitclaimed the quarter to Wampol, and in 1892 the husband of Kountz obtained a quitclaim deed from the father of Kountz, purporting to convey the quarter back to he and his wife. In 1898 Wampol somehow learned or was informed about what had happened, and he filed an action against Kountz and her husband, seeking to have their claim that they still owned the quarter declared to be invalid. Kountz argued that she had always owned the quarter, because the deed recorded by her father in 1873 had been a forgery and was therefore patently invalid and worthless, so both of the subsequent conveyances of the quarter, to Marsh and to Wampol, were necessarily invalid and Wampol had acquired nothing. The Court upheld a lower court ruling that Wampol was the sole owner of the quarter, and neither Kountz nor her husband held any interest in it, despite the forgery and despite the chain of quitclaim deeds upon which Wampol's case rested. In so holding, since Wampol had made no adverse possession claim, the Court concluded that the equitable factors of estoppel and laches formed a legitimate basis for the outcome in Wampol's favor. In the view of this scenario taken by the Court, the most critical event of all was the 1885 discovery by Kountz of the crime of her father, and the Court elected to take this opportunity to demonstrate that it will not tolerate any form of complicity with such a criminal act. Kountz had in effect become an accomplice to her father's theft of her own land, in the eyes of the Court, by virtue of her silence after her discovery of what he had done, and the Court therefore declared her guilty of laches, which signifies an unjustifiable delay in acting, and which results in a termination of the rights of the guilty party through estoppel. Her 13 ensuing years of silence, the Court determined, had effectively foreclosed any opportunity she might have had to recover ownership of her quarter section, if she had acted promptly upon discovering what had occurred. Since it involves an actual crime, this case definitely represents an extreme situation, rather than a typical land rights dispute, but it does serve to clearly illustrate that the Court always expects those dealing with land rights, as either grantors or grantees, to act in good faith, and to act promptly, whenever land rights issues appear, or risk losing their rights. We will take further note of the judicial application of the powerful equitable concepts of laches and estoppel to land rights issues as we proceed through the decades.

**"The price of success is hard work,
dedication to the job at hand,
and the determination that
whether we win or lose,
we have applied the best of ourselves
to the task at hand."**

- Vince Lombardi -

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